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25 UNITED STATES DISTRICT COURT
26 EASTERN DISTRICT OF WASHINGTON

27 **NORTHWEST AGRICULTURAL**
28 **PRODUCTS, INC.,** a Washington
29 corporation,

30 Plaintiff,

31 v.

32 **EMERALD BIOAGRICULTURE**
33 **CORP.,** a Delaware corporation,

34 Defendant

No. CV-08-5042-EFS

PROTECTIVE ORDER

35 Pursuant to the stipulation of the parties, the Court enters this
36 Protective Order to govern the handling of documents, discovery responses,

1 depositions, pleadings, exhibits, and all other information exchanged in this
2 action.

3 1. This Order shall govern

4 (a) all testimony at depositions;

5 (b) all documents, information, materials or things produced
6 by Plaintiff, Defendant, or any third party ("Producing Party") in response to
7 discovery requests and subpoenas, under the Federal Rules of Civil
8 Procedure, or otherwise;

9 (c) all copies, abstracts, excerpts, analyses, summaries, or
10 other materials (written, electronic, or in other form) that contain, reflect or
11 disclose information contained in such testimony, documents, or other
12 materials.

13 The items listed in (a)-(c) above shall be referred to as "Discovery
14 Materials."

15 2. Any Producing Party shall have the right to designate Discovery
16 Materials it produces as "CONFIDENTIAL" or "HIGHLY
17 CONFIDENTIAL" pursuant to this Protective Order and materials designated
18 as such will be referred to as "Designated Materials."

19 (a) Discovery Materials marked "CONFIDENTIAL" shall be
20 those Discovery Materials, including any document, file, portion of file,
21 transcribed testimony or other material that the Producing Party in good faith
22 reasonably believes to comprise trade secret or other confidential research,
23 development or commercial information of the Producing Party.

24 (b) Discovery Materials marked "HIGHLY
25 CONFIDENTIAL" shall be those Discovery Materials, including any
26 document, file, portion of file, transcribed testimony or other material that the

1 Producing Party in good faith reasonably believes to comprise trade secrets or
2 other competitively sensitive confidential information, research, development,
3 financial or other commercial information of the Producing Party that requires
4 heightened protection. Discovery Materials may only be designated
5 HIGHLY CONFIDENTIAL if the Producing Party believes in good faith that
6 designation as CONFIDENTIAL will not provide adequate protection.

7 3. A Producing Party shall designate Discovery Materials as
8 follows:

9 (a) a Producing Party may designate materials by stamping
10 the words "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" thereon.
11 Any Designated Materials produced in non-paper media (e.g., videotape,
12 audiotape, computer disk) may be designated as such by labeling the outside
13 of such non-paper media, with specific identification as to which portions of
14 the media are protected, as "CONFIDENTIAL" or "HIGHLY
15 CONFIDENTIAL." In the event a receiving party generates a paper copy,
16 transcription, or printout from any such designated non-paper media, such
17 party must mark the covered item as "CONFIDENTIAL" or "HIGHLY
18 CONFIDENTIAL," and the hard copy, transcription or printout shall be
19 treated as it is designated.

20 (b) in the case of depositions, designation of the portion of the
21 transcript (including exhibits) that contains Designated Materials shall be
22 made (1) by a statement on the record during the course of the deposition, or
23 (2) within fifteen days after receipt of a certified transcript from the court
24 reporter by counsel to the Producing Party to whose Designated Materials the
25 deponent had access. Pending such designation by counsel, the entire
26 deposition transcript, including exhibits, shall be deemed "HIGHLY

1 CONFIDENTIAL.” If no designation is made within fifteen days after
 2 counsel for the Producing Party has received a certified transcript from the
 3 court reporter, the transcript shall be considered not to contain Designated
 4 Materials.

5 4. Designated Materials will not be filed with the Court unless it is
 6 necessary to do so for purposes of trial, motions for summary judgment, or
 7 other matters. A party that files with the Court, or seeks to use at trial,
 8 Designated Materials, and who seeks to have the record containing such
 9 information sealed, shall submit to the Court a motion to seal pursuant to
 10 Local Rule CR 5(g)(2).

11 A party that files with the Court, or seeks to use at trial, Designated
 12 Materials designated by anyone other than itself, and who does not seek to
 13 have the record containing such information sealed, shall comply with either
 14 of the following requirements:

15 (a) At least five business days prior to the filing or use of the
 16 Designated Materials, the submitting party shall give notice to all other
 17 parties, and to any Producing Party, of the submitting party’s intention to file
 18 or use the Designated Materials, including specific identification (by
 19 reference to production number or other identifier) of the Designated
 20 Materials. Any affected party or Producing Party may then file a motion to
 21 seal, pursuant to Local Rule CR 5(g)(2); or

22 (b) At the time of filing or desiring to use the Designated
 23 Materials, the submitting party shall submit the materials pursuant to the
 24 following procedure: (i) the document(s) containing Designated Materials
 25 shall be filed under seal pursuant to the ECF guidelines applicable to the
 26 United States District Court for the Eastern District of Washington; and (ii)

1 the document(s) must be labeled "CONDITIONALLY UNDER SEAL". Any
2 affected party or Producing Party may then file a motion to seal, pursuant to
3 Local Rule CR 5(g)(2), within ten business days after the document(s) are
4 filed. If no party or Producing Party files a motion to seal after the expiration
5 of ten business days, the parties agree to stipulate to a motion to unseal the
6 document(s) in question.

7 To the extent practicable, Designated Materials to be filed with the
8 Court shall be filed separately or in severable portions of filed papers, so that
9 the non-designated portions may freely be disseminated.

10 5. An inadvertent failure to designate Discovery Materials as
11 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" does not, standing
12 alone, waive the Producing Party's right to secure protection under this Order
13 for such materials. If Discovery Materials are designated as
14 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" after it is initially
15 produced, the receiving party, on timely notification of the designation, must
16 make reasonable efforts to assure that the Designated Materials are treated in
17 accordance with the provisions of this Order.

18 6. Discovery Materials shall be used by the receiving party solely
19 for the purpose of conducting this litigation, and not for any other purpose
20 whatsoever.

21 7. Discovery Materials designated as "CONFIDENTIAL" shall be
22 used by the receiving party solely for the purposes of this litigation, and may
23 be disclosed only to the following persons:

24 (a) any current employee of a party to whom it is deemed
25 necessary that the Designated Materials be shown for purpose of the
26 litigation, including but not limited to any current employee disclosed

1 pursuant to F.R.Civ.P. 26(a)(2)(A) who may provide expert testimony at trial,
2 provided that any such employee shall be advised that he or she is subject to
3 the terms of this protective order before being provided Designated Materials;

4 (b) outside counsel (defined as the attorneys and their firms
5 who have entered an appearance in this case) for the respective parties, and
6 employees and independent contractors for outside counsel that are engaged
7 in work necessary to assist in this litigation;

8 (c) experts or consultants retained for purposes of this
9 litigation who are not employed by a party and who qualify as an Approved
10 Expert or Approved Consultant as described in Paragraphs 9 and 10, but
11 solely for the purposes of this litigation and only after such experts or
12 consultants execute a written acknowledgment, in the form attached as
13 Exhibit A hereto, that the expert or consultant is bound by this Order;

14 (d) a witness in the course of deposition, hearing, or trial
15 testimony where counsel has a reasonable and good faith belief that
16 examination with respect to the Designated Materials is necessary; provided
17 that the witness agrees to be bound by the terms of this Order;

18 (e) the author of the document and anyone shown on the
19 document as having received it in the ordinary course of business;

20 (f) court reporters and persons preparing transcripts of
21 depositions;

22 (g) in-house lawyers for the respective parties and their staff;

23 (h) the Court, Court personnel, and jurors or potential jurors;

24 and
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1 (i) any other person only upon order of the Court or upon
2 stipulation of the Producing Party, in writing or on the record of a deposition,
3 hearing or trial.

4 8. Discovery Materials designated as "HIGHLY
5 CONFIDENTIAL," shall be used by the receiving party solely for the
6 purposes of this litigation shall not be disclosed by any means, including
7 orally or in writing, to any employee of the receiving party except upon Court
8 Order, and may be disclosed only to the following persons:

9 (a) outside counsel (defined as the attorneys and their firms
10 who have entered an appearance in this case) for the respective parties, and
11 employees and independent contractors for outside counsel that are engaged
12 in work necessary to assist in this litigation;

13 (b) experts or consultants retained for purposes of this
14 litigation who are not employed by a party and who qualify as an Approved
15 Expert or Approved Consultant as described in Paragraphs 9 and 10, but
16 solely for the purposes of this litigation and only after such experts or
17 consultants execute a written acknowledgment, in the form attached as
18 Exhibit A hereto, that the expert or consultant is bound by this Order;

19 (c) the author of the document and anyone shown on the
20 document as having received it in the ordinary course of business;

21 (d) court reporters and persons preparing transcripts of
22 depositions;

23 (e) the Court, Court personnel, and jurors or potential jurors;
24 and
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1 (f) any other person only upon order of the Court or upon
2 stipulation of the Producing Party, in writing or on the record of a deposition,
3 hearing or trial.

4 9. To qualify as an Approved Expert or an Approved Consultant,
5 the party proposing to provide Designated Materials to such expert or
6 consultant shall provide the party that produced such Designated Materials
7 with: (i) a current curriculum vitae for the expert or consultant, which shall
8 include a description of past and present employers by whom the expert or
9 consultant has been employed and (subject to the second sentence of this
10 paragraph) persons or entities by whom the expert or consultant has been
11 engaged in any consulting or expert engagements within the last five (5)
12 years, as well as a general description of the nature of such engagements, and
13 (ii) a copy of a completed and signed undertaking in the form attached hereto
14 as Exhibit A. If an expert or consultant is precluded by virtue of a non-
15 disclosure agreement from disclosing either the existence or nature of any
16 such engagement or the identity of the entity for which the services were or
17 are being performed, then the expert or consultant shall state that certain
18 information is being withheld on that basis and may supplement his or her
19 disclosure with such additional information as he or she believes would be
20 helpful to the parties and the Court in determining whether any undisclosed
21 consulting relationship would create a genuine likelihood that the expert or
22 consultant would, in the course of any such undisclosed engagement, use or
23 disclose information designated "Confidential," or "Highly Confidential" for
24 purposes other than this litigation.

25 (a) Within five (5) business days after the other party's receipt of the
26 information and signed undertaking described above from the party seeking

1 approval, the other party may object in writing to the proposed expert or
2 consultant if facts available to that party show that there is a reasonable
3 likelihood that the proposed expert or consultant will use or disclose
4 information designated "Confidential," or "Highly Confidential" for purposes
5 other than this litigation or if the expert or consultant states that he or she is
6 unable to disclose information concerning other engagements due to a non-
7 disclosure agreement. The written objection shall set forth the specific factual
8 basis for the objection. Failure to object in writing to a proposed expert or
9 consultant within five (5) business days shall be deemed approval, but shall
10 not preclude a party from objecting to continued access to material designated
11 as "Confidential," or "Highly Confidential" by that expert or consultant where
12 facts subsequently learned by the party or its counsel suggesting that such a
13 basis for objection exist.

14 (b) If the other party so objects, the parties shall meet and confer in
15 good faith in an attempt to resolve their dispute without resort to the Court. If
16 the parties' dispute remains unresolved as of five (5) business days following
17 the objecting party's communication of its objection, then the party seeking to
18 make or continue disclosure to such consultant may seek a ruling from the
19 Court as to the merits of the other party's objection. Pending a ruling by the
20 Court, the proposed consultant shall not have access to material or
21 information designated by the objecting party as "Confidential," or "Highly
22 Confidential" unless such access has been previously approved.

23 (c) In the event the Court finds it necessary to retain an expert to
24 assist it in resolving a dispute regarding a consultant's right to have access to
25 material or information designated as "Confidential" or "Highly Confidential"
26 the parties shall share equally in the fees of any such court-retained expert.

1 10. Notwithstanding any other provisions of this Protective Order,
2 under no circumstances shall either party disclose any Designated Materials
3 of the other party to any person who is involved in the preparation or
4 prosecution of any patent applications which encompass the technology
5 described or referenced in whole or in part in U.S. Patent Nos. 5,439,873;
6 5,840,656; and 6,534,446 (the "Patents-In-Suit") and in any continuations,
7 continuations in part, reissues or divisionals that derive therefrom. In addition,
8 such persons shall be barred from any involvement, direct or indirect, in claim
9 drafting or amendments in connection with reexamination proceedings for the
10 Patents-In-Suit or for any continuation, continuation in part, reissue, or
11 divisional patents that derive therefrom. However, such persons shall not be
12 barred from assisting or participating in responding to Patent Office
13 rejections, if any, issued during such reexaminations, if any, provided they
14 comply with the restrictions in the previous sentence. For purposes of this
15 Paragraph only, "Designated Materials" means materials of a technical nature
16 that relate to the technology at issue.

17 11. Persons who are authorized to review Designated Materials shall
18 hold such materials in confidence and shall not disclose their contents, either
19 verbally or in writing, to any person not otherwise authorized to receive such
20 information under this Order, except as otherwise required by law.

21 12. A party shall not be obligated to challenge the propriety of a
22 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" designation at the time
23 made and failure to do so shall not preclude a subsequent challenge thereto
24 during the pendency of this litigation.

25 13. In the event that any party disagrees with a Producing Party's
26 designation, such disagree party shall provide the Producing Party written

1 notice of its disagreement and the reasons for such disagreement. The parties
2 shall meet and confer to try to resolve the disagreement within seven (7) days
3 of receipt of a written notice of disagreement. If the dispute is not resolved
4 after such time then the party seeking to maintain the information's
5 designation as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" shall
6 file a motion with the court within seven (7) days. The burden of proving that
7 the Discovery Materials have been properly designated is on the Producing
8 Party. Discovery Materials shall retain their designated status until such time
9 as (a) the parties expressly agree otherwise in writing, or (b) the Court orders
10 otherwise, unless such order is stayed pending appellate review.

11 14. In the event a receiving party having possession, custody or
12 control of any Designated Materials designated by anyone other than itself
13 receives a subpoena, or other process or order to produce such materials in
14 another legal proceeding, such receiving party shall notify counsel for the
15 Producing Party and furnish a copy of such subpoena, process or order and
16 shall cooperate with respect to all reasonable procedures sought to be pursued
17 by the Producing Party whose interests may be affected. The Producing Party
18 shall have the burden of defending against such subpoena, process or order.
19 Except during a pending motion to quash, or to the extent the Producing Party
20 is successful in obtaining an order modifying or quashing the subpoena or
21 other process or order, the receiving party shall be entitled to comply with the
22 subpoena or other process or order.

23 15. Producing or receiving Designated Materials or otherwise
24 complying with this Order shall not (a) operate as an admission that any
25 Designated Materials actually contain or reflect trade secrets or other
26 confidential information, (b) prejudice the right of any party to object to the

1 authenticity or admissibility of any Designated Materials; (c) be construed as
2 waiving any right to assert a claim of privilege, relevance, trade secret,
3 overbreadth, burdensomeness, or other objection to production of materials or
4 information; or (d) prevent the parties from agreeing to alter or waive the
5 protections or remedies provided in this Order, provided that such agreement
6 is in writing and signed by both parties.

7 16. This Order is without prejudice to the right of any party to seek
8 relief from the Court, upon good cause shown, from any of the provisions in
9 his Order.

10 17. At the termination of this action, the restrictions on the
11 communication and disclosure provided for herein shall continue to be
12 binding upon the parties and all persons to whom Designated Materials or
13 information contained therein has been communicated.

14 18. Upon request by the Producing Party, all Designated Materials
15 shall be returned to the respective Producing Party upon termination of this
16 action (or, upon written permission of the Producing Party, destroyed).
17 Termination of this action shall be taken and construed as the date forty-five
18 (45) days following (a) the filing of a stipulated dismissal or the entry of a
19 voluntary dismissal; (b) a final non-appealable order disposing of this case; or
20 (c) the expiration of the time for any appeal. Counsel for the receiving party
21 shall notify counsel for the Producing Party in writing of compliance with this
22 paragraph. Nothing in this paragraph shall preclude outside counsel from
23 retaining after termination of this action one copy of (a) pleadings, motions,
24 and memoranda filed with the Court; and (b) deposition, hearing and trial
25 transcripts and exhibits; provided, however, that such counsel may not
26 disclose retained materials that contain Designated Materials to any other

1 person and shall keep such retained materials in a manner reflecting their
2 confidential nature.

3 19. If Designated Materials are disclosed to any person other than in
4 the manner authorized by this Order, the person responsible for the disclosure
5 shall immediately bring all the pertinent facts relating to such disclosure to
6 the attention of counsel for all parties and the Producing Party without
7 prejudice to the rights and remedies of any party, and shall make every effort
8 to prevent further disclosure by it or by the person who was the recipient of
9 such information.

10 20. Nothing herein shall preclude a Producing Party from using her,
11 his or its own confidential information, documents, or materials in any
12 manner she, he or it sees fit, or from revealing such information, documents
13 or materials to whomever she, he or it chooses.

14 21. If, through inadvertence, a Producing Party provides information
15 protected by the attorney client privilege or any other privilege, or documents
16 protected from discovery by the work product doctrine, the Producing Party
17 may subsequently inform the receiving party of the nature of the disclosed
18 information, and, upon receipt of written notice from the Producing Party, the
19 receiving party shall immediately return the information and all copies thereof
20 to the Producing Party and shall not use the information in any way.

21 22. This Order shall remain in full force and effect and survive the
22 termination of this Action unless modified by an Order of this Court or by the
23 written stipulation of the parties filed with the Court.
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1 IT IS SO ORDERED

2 DATED this 6th day of February, 2009.

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4 s/ Edward F. Shea

5 UNITED STATES DISTRICT JUDGE
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EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

**NORTHWEST AGRICULTURAL
PRODUCTS, INC.**, a Washington
corporation,

Plaintiff,

v.

**EMERALD BIOAGRICULTURE
CORP.**, a Delaware corporation,

Defendant

No. CV-08-5042-EFS

**CONFIDENTIALITY
AGREEMENT**

The undersigned has read the Protective Order entered in this action
and understands and agrees that he/she is bound by its terms.

DATED: _____, 200__.

Print Name: _____